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No. 80-988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HAVENS REALTY CORPORATION and ROSE JONES,
Petitioners,

v.

SYLVIA COLEMAN, R. KENT WILLIS and
HOUSING OPPORTUNITIES MADE EQUAL

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE CENTER FOR NATIONAL POLICY REVIEW, AND THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICI CURIAE*

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INTEREST OF *AMICI CURIAE* *

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. Through its national office in Washington, D.C. and local Lawyers' Committee such as the Washington, D.C. Lawyers' Committee for Civil Rights Under

* The parties' letters of consent to the filing of this brief are being filed with the Clerk pursuant to Rule 36.1.

Law, the organization has over the past eighteen years enlisted the services of thousands of members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit organization incorporated under the laws of the State of New York in 1940. It was formed to assist blacks to secure their constitutional rights by the prosecution of lawsuits. Its purposes include rendering legal aid gratuitously to blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf, and its charter was approved by a New York court, authorizing the organization to serve as a legal aid society. The Fund is independent of other organizations and is supported by contributions from the public.

Attorneys employed by or associated with the Legal Defense Fund have participated in numerous fair housing cases in the federal courts, including this Court, *e.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948), and have submitted briefs *amicus curiae* in other such cases, *e.g.*, *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

The Center for National Policy Review (CNPR) is a privately-funded public interest law center located in the Catholic University School of Law. Founded in 1970, CNPR represents the interests of the civil rights community within the federal policy-making and administrative process. Because the need for the enforcement of the right to secure housing free of discrimination is of primary importance, CNPR has been particularly concerned with the administration and implementation of Title VIII (Fair Housing Act of 1968).

The Washington Lawyers' Committee for Civil Rights Under Law was founded in 1968 to help focus the energies of the private bar on civil rights and poverty issues affecting the greater Washington area. The Washington Committee has organized panels of volunteer attorneys to work on cases affecting individuals and important law reform issues in the areas of equal housing and employment opportunities, narcotics addiction, the parole process, and immigration. More than 650 volunteer attorneys from over 80 area law firms have worked on Washington Committee projects, expending (for example) in 1978 well over 20,000 hours of lawyers' time.

All of the *amici* organizations, their local committees, affiliates and volunteer attorneys thus have been actively engaged in providing legal representation to those seeking relief under federal civil rights legislation. Their litigation includes cases raising housing discrimination issues similar to those presented here.

This case raises a welter of questions concerning the standing of various parties plaintiff and the timeliness of the filing of the action. Determination of those issues turns on the peculiar facts and circumstances involved, but the Court's decision will also have a significant effect upon other lawsuits under the Fair Housing Act of 1968 and similar statutes. This is especially so because petitioners raise standing claims under Article III of the Constitution.

Amici believe that the Court should proceed cautiously, however, in addressing the issues in this case. As we show below, events which have transpired since the entry of the judgment below, about which the Court has not yet been informed, have worked a significant material change in the factual posture of this case and may render it moot.

For this reason, *amici* suggest that the most appropriate disposition of this matter would be to dismiss

the writ as improvidently granted. Alternatively, the Court could remand the case to the district court for consideration of possible mootness, and for reconsideration of the trial court's earlier ruling in light of this Court's intervening decision in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). *See, e.g., Johnson v. Board of Educ. of Chicago*, —— U.S. ——, 66 L. Ed. 2d 162 (1980) (remanding for consideration of matters raised in Suggestion of Mootness and responses thereto). That disposition would require vacating the opinion and judgment below. *See County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 and accompanying text (1979).

Even if the Court does not wish to dispose of the case in this fashion, *amici* submit that it is neither necessary nor appropriate to reach and decide all of the various issues which have been raised and briefed by the parties as a result of the alternative holdings anounced by the Fourth Circuit. The Court should adhere to its practice of adjudicating constitutional questions only when necessary to the disposition of a case. Because the substantive issues presented by petitioners in this matter are inextricably interrelated on the present record, they cannot be appropriately narrowed for decision by this Court in the absence of further proceedings below. The remand for this purpose which *amici* suggest would isolate and sharpen the questions which *must* be decided here, leaving for another day those which should be reached only in the context of a different case in which their determination will be critical.

STATEMENT

The relevant facts of record in this matter are not disputed. In the spring of 1978, Coleman and Willis visited the offices of petitioner Havens to obtain information about apartment availability for their employer, respondent H.O.M.E. (Housing Opportunities Made

Equal). Subsequently, Coleman, Willis, and other H.O.M.E. employees conducted "tests" to determine whether prospective lessees of different races were given the same information about availability in two apartment complexes managed by petitioner Havens Realty. These "tests" involved successive visits and inquiries about vacancies of Havens' employees by Coleman, who is black, and Willis, who is white (or by another white H.O.M.E. employee, John Barr, who is not a respondent in this case). The "tests" indicated that Havens employees were "steering," either by directing blacks who inquired about apartment availability only to one of the two complexes, or by representing to them that there were no vacancies—while whites who inquired were told of apartments available in either development.

Coleman and Willis were "testers" because at the times they visited Havens' offices, they had no present intention to enter into a lease of any apartment which might be available in either complex; rather, their motivation was to determine whether Havens treated black and white prospective lessees differently on account of race. The complaint alleges that both Coleman and Willis are "residents of the City of Richmond or Henrico County . . . ."

On July 13, 1978, a black man named Paul Allen Coles, who did wish to reside in one of the apartment developments handled by Havens, inquired about availability from Havens' employees. Coles was informed that the only apartment available was in the other complex, to which the earlier "tests" indicated that blacks were being steered. Later that same day, the complaint alleges, white "tester" John Barr visited Havens' offices and was told of an available apartment in the complex in which Coles had wished to reside.

This lawsuit, charging Havens Realty with racial steering in violation of the Fair Housing Act (Title VIII

of the Civil Rights Act) of 1968, 42 U.S.C. §§ 3601 *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1982, was filed 180 days later. Plaintiffs in the suit were Coles, Coleman, Willis, and H.O.M.E. Broad injunctive relief, damages, and attorneys' fees were sought. In response to Havens' motion, the district court dismissed all of the plaintiffs except Coles, on the grounds that Coleman, Willis and H.O.M.E. lacked standing, and that the suit was filed too late with respect to Coleman and Willis in any event since their last "test" of Havens' practices occurred more than 180 days prior to the filing of the suit.

Respondents were then granted a final judgment as to the standing and timeliness issues, pursuant to F.R. Civ. P. 54(b), and they appealed to the Fourth Circuit, which on September 11, 1980 rendered its opinion and judgment reversing the district court's rulings. This Court granted *certiorari* to review that judgment on April 20, 1981.

The additional relevant facts about which the Court appears not yet to have been advised are as follows:

After respondents appealed with respect to plaintiffs Coleman, Willis and H.O.M.E., proceedings in the district court continued on behalf of plaintiff Coles. On February 13, 1980, pursuant to F.R. Civ. P. 23(b)(2), Coles was recognized as the representative of a certified plaintiff class of "all black persons who may have been injured monetarily by the alleged racial steering practices of [Havens]on or since January 9, 1977," *Coles v. Havens Realty Corp.*, Civ. No. 79-0024 (E.D. Va., Feb. 17, 1981), *reprinted in* EQUAL OPP. HOUS. ¶ 18,031 (P-H). *See Turner v. A.B. Carter, Inc.*, 85 F.R.D. 360 (E.D. Va. 1980). The case was tried June 22 and 23, 1980, and the parties thereafter entered into a Consent Decree approved by the district court on February 17, 1981, which recites that

> The Court finds from the evidence presented in this case that the policies and acts of the defendants

> Havens Realty Corporation and Rose Jones violated the provisions of the Fair Housing Act of 1968 and the Civil Rights Act of 1866.

Coles v. Havens Realty Corp., supra, at 18,136. The consent decree permanently enjoined the petitioners from violating either statute and granted extensive additional injunctive relief for a period of three years, including recordkeeping of visitors to Havens' offices and applicants for apartments, posting of racial occupancy and vacancy information in its offices on a current basis for both apartment complexes, display of fair housing logos in the office, and use of the logos on all forms and in all advertisements. It awarded $2250 damages to Coles and established a $13,500 claim fund for class members, permitting H.O.M.E. to counsel prospective claimants against the fund. Finally, it required the payment of $17,500 in attorneys' fees by Havens. *Id.* at 18,136-38. The only matters not addressed explicitly in the consent decree are the claims of Coleman, Willis and H.O.M.E. for damages.

On July 1, 1981, the district court approved payment of various claims filed by class members against the $13,500 fund established by the consent decree. The court further directed that the case be "closed," subject to the terms of the permanent injunction which had issued as part of the decree.

SUMMARY OF ARGUMENT

The appeal below involved an order of dismissal as to some, but not all, of the plaintiffs in this case, pursuant to F.R. Civ. P. 54(b). After the Court of Appeals issued its decision, the remaining plaintiff (who had been certified as representative of a class) and the petitioners entered into a consent decree which appears to grant substantialy all of the relief sought in the complaint, and which includes language that may be interpreted as relinquishing the claims of the dismissed plaintiffs who had appealed. The Court should, therefore, dismiss the writ

as improvidently granted or remand this case for a determination as to possible mootness.

Alternatively, the Court should remand so that the issues can be further developed and narrowed with the result of limiting the number or scope of constitutional questions which this Court would be required to decide in this case. Because of the alternative holdings announced below, the issues cannot be narrowed absent such a remand.

ARGUMENT

I

In Light Of Events Which Have Occurred Subsequent To The Entry Of Judgment Below, This Court Should Not Reach The Merits Of This Case

As indicated in the brief Statement, *supra*, this case reaches the Court in a rather unusual posture. As a result of the F.R. Civ. P. 54(b) judgment permitting an appeal of the trial judge's standing and timeliness determinations as to respondents, those issues were litigated before the Fourth Circuit at the same time as the factual allegations of the complaint were made the subject of evidentiary proof and hearing.[1] Following the hearing, the remaining plaintiff (represented by the same counsel as respondents) and the petitioners stipulated to a finding of racial steering in violation of the Fair Housing Act of 1968 and the Civil Rights Act of 1866—and to the entry of a judgment awarding broad injunctive relief, damages to Coles and to the class of plaintiffs whom he represented, and attorneys' fees to plaintiffs' counsel.

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[1] Although it is not apparent from the record before this Court nor from the consent decree entered February 17, 1981, Coleman and Willis testified as H.O.M.E. employees on behalf of Coles at the June, 1980 trial. The consent decree makes specific provision for H.O.M.E. to counsel class members. *See Coles v. Havens Realty Corp.*, *supra* at 18,138.

In these circumstances, it simply is not clear what is left of this lawsuit, as it was originally framed in the complaint filed by respondents and Coles. On its face, the consent decree appears to provide substantially the relief sought in the case. To be sure, respondents had been dismissed as formal plaintiffs in the case at the time the consent decree was negotiated and approved, and their respective claims for damages from petitioner Havens were not addressed explicitly in that decree. However, the decree on its face does appear to resolve the claims of

> . . . *all plaintiffs*, including those that may hereafter be joined by the Court pursuant to the class certification of this action, *for all damages, costs, expenses*, and fees incurred in all negotiations and/or other activities *arising out of the Complaint filed herein.*

Coles v. Havens Realty Corp., *supra*, at 18,138 (emphasis supplied). The effect of this language has not yet been determined, but it is certainly conceivable that, either as a result of this provision of the decree or by virtue of the substantial relief awarded in the decree, the controversy between the parties is now moot.[2]

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[2] Neither petitioners (in their petition for certiorari or their brief on the merits) nor respondents (in their Brief in Opposition to Certiorari or in a subsequent filing) have yet advised the Court of the entry of the consent decree. Respondents may have felt bound to defend the judgment and opinion of the court below—or may wish to obtain a ruling from this Court because H.O.M.E.'s operations in the Richmond area continue. *See, e.g.*, EQUAL OPP. HOUS. ¶ 19,505 (P-H). Petitioners similarly may desire to have this Court's views on the reasoning of the court below. Of course, the parties may not stipulate a case to be within the jurisdiction of this Court. *See Minnick v. California Dep't of Corrections*, 49 U.S.L.W. 4609 (June 1, 1981); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Indiana Employment Security Div. v. Burney*, 409 U.S. 540 (1973); *Swift & Co. v. Hocking Valley R.R.*, 243 U.S. 281, 289 (1917); *South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300 (1892).

Petitioners have advanced serious constitutional claims, but that fact only underscores the urgency of determining whether or not this litigation has continuing vitality. For this Court has many times emphasized that it follows a " 'policy of strict necessity in disposing of constitutional issues,' *Rescue Army v. Municipal Court*, 331 U.S. 549, 568 . . . ." *Minnick v. California Dep't of Corrections*, 49 U.S.L.W. 4609, 4613 (June 1, 1981).

The mootness determination can best be made by the district court, which is also in the best position to construe the terms of the consent decree. Further proceedings in the trial court, if the case is determined not to be moot, would have several additional advantages: (1) the trial court could reconsider its rulings as to the standing of the various respondents in light of this Court's subsequent decision in *Gladstone, Realtors v. Village of Bellwood, supra* [hereinafter cited as *"Bellwood"*].[3] (2) The ambiguities of the record, upon which petitioners focus significant attention (*see* Brief for Petitioners, at 26-27, 30-31), could be clarified by appropriate amendment of the complaint to delineate the exact location of Coleman's and Willis' residences, and the precise impact upon the surrounding neighborhoods of Havens' adjudicated racial steering practices, *see Bellwood, supra*, 441 U.S. at 112 n.25. (3) Similarly, uncertainties concerning the residential location of H.O.M.E.'s membership (*see* Brief for Petitioners, at 13-14) could be eliminated through amendment of the pleadings. (4) The question of the timeliness of the filing of this action could be redetermined by the district court with respect to the claims of Coleman and Willis as residents of the affected community (*see* pp. 12-14 *infra*), if the trial

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[3] The district judge apparently recognized that his ruling was open to question after *Bellwood*, for he sought a remand of this case from the Fourth Circuit in light of that decision. *See Turner v. A.B. Carter, Inc., supra*, 85 F.R.D. at 363 n.3.

court reaches a different result as to their standing in this capacity under *Bellwood, supra.*

For these reasons, and in light of the altered posture of this case, *amici* suggest that the writ of certiorari be dismissed as improvidently granted, which will have the effect of returning the matter to the district court. Alternatively, the Court may wish to vacate the judgment below and remand the case to the district court for consideration of possible mootness, *see, e.g., Johnson v. Board of Educ. of Chicago, supra; Indiana Employment Security Div. v. Burney, supra*; this disposition would remove any precedential weight from the ruling below, *see County of Los Angeles v. Davis, supra,* 440 U.S. at 634 n.6.

II

Alternatively, This Court Should Remand For Further Development And Narrowing Of The Issues

As we have previously remarked, the Court is presented with a multiplicity of issues relative to respondents' standing and the timeliness of this suit's commencement because of the alternative holdings by the Fourth Circuit. At the same time, as we show below, many of the issues are interrelated and their disposition in this case depends upon specific additional factual allegations or proof. *Amici* urge the Court to remand this case, rather than attempting to decide all of these questions, so as to allow reconsideration of the district court's rulings in light of *Bellwood, supra,* amendment of the pleadings, and narrowing of the issues. This disposition is likely to result in avoiding the necessity for this Court to decide at least some of the multiple questions presented in the current posture of this action.

All of the issues raised before the Court are interrelated with each other, and decision of some will make unnecessary disposition of the others. For example, if

Willis and Coleman have standing as residents of areas affected by the discriminatory steering practices of Havens,[4] there would be no need to address the timeliness issues, since in their capacity as residents of the "target area," [5] *see Bellwood, supra*, 441 U.S. at 112 n.25, they would have suffered injury when Coles was steered on July 13, 1978 [6]—and their complaint, filed 180 days later, would clearly have been timely. Similarly, if standing were sustained under § 1982, as the district court recognized there would be no problem regarding timeliness. On the other hand, if Willis and Coleman have standing as "testers," [7] then the timeliness questions must be de-

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[4] The district court held racial steering to violate both the 1968 Fair Housing Act and the Civil Rights Act of 1866, 42 U.S.C. § 1982. *Coles v. Havens Realty Corp., supra*, at 18,136. This holding was not disturbed by the Court of Appeals and petitioner has not contested that determination here. Hence, this Court need not pass upon the matter. *See Bellwood, supra*, 441 U.S. at 115 n.32. (The Court in that case did recognize the severe consequences which could follow steering on a major scale, *id.* at 109-11.)

[5] The complaint alleges that Coleman and Willis are "residents of the City of Richmond or Henrico County," which is certainly broad enough to encompass residence within the "target area." As this Court suggested in *Warth v. Seldin*, 422 U.S. 490, 501 (1975), if there was a need for "further particularized allegations of fact deemed supportive of plaintiff[s'] standing," the district court should have "require[d] the plaintiff[s] to supply [them], by amendment to the complaint or by affidavits," rather than dismissing.

[6] Steering "testers" does not affect their ability to reside in integrated communities nor deprive them of interracial associations since by definition "testers" are not seeking to relocate. But as residents of a "target area," "testers" would suffer injury whenever a *bona fide* minority applicant for purchase or lease of property is steered.

[7] *Amici* believe that the issue of "tester standing" involves a novel question as to which this Court's guidance would be of assistance to the lower courts, *see* Supreme Court Rule 17.1(c), and that there is strong support in the statute, the legislative

cided—but not whether the allegations of the complaint were sufficient to support their alternative claims of standing as residents of the area affected by Havens' steering who were denied the benefits of interracial associations by Havens' conduct. The questions of H.O.M.E.'s standing—either in a capacity as representative of its members or suing in its own organizational status—and the timeliness of its filing, are likewise intertwined.

This phenomenon is not unusual, and ordinarily it would not counsel a remand. Here, however, such a disposition is appropriate for several reasons. *First*, this Court has traditionally sought to avoid unnecessary decision of constitutional issues. *See Minnick v. California Dep't of Corrections*, *supra*, and cases cited therein. Developments on remand of this action may obviate the need for a decision of the constitutional questions raised. *Second*, as we have noted, petitioners' arguments concerning the standing of H.O.M.E. as representative of its

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history and the case law for recognizing "tester" standing to challenge racial steering practices. The question was briefed by the Lawyers' Committee in its *amicus* brief in *Bellwood*, *supra*, but not reached by the Court, *see id.*, 441 U.S. at 111. For the Court's convenience, we repeat those arguments in an appendix hereto. Our submission is, in short, that the racial steering to which respondents Coleman and Willis were subjected deprived them of specific rights guaranteed by the Fair Housing Act—and that invasion of those rights therefore constitutes the requisite personal injury supporting their standing to sue. *Warth v. Seldin*, *supra*, 422 U.S. at 514 (". . . Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute"); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). This was not the reasoning of the Court of Appeals, which viewed respondents as "bona fide surrogates" for the victims of discrimination and relied upon "strong public policy" considerations, *Coles v. Havens Realty Corp.*, 633 F.2d 384, 387 (4th Cir. 1980).

members and of Coleman and Willis as residents of the "target area" primarily involve the degree of specificity of the allegations of the complaint (*see* Brief for Petitioners at 11-17), a matter to which the court below was sensitive. The Fourth Circuit panel emphasized in its ruling that it was merely permitting respondents to proceed to trial, and that adequate proof to support the standing claims would have to be adduced; and it suggested that the district court require amendment of the complaint to provide greater specificity. *Coles v. Havens Realty Corp.*, *supra*, 633 F.2d at 391; see note 5 *supra*; *see also Bellwood*, *supra*, 441 U.S. at 112 n.25; *Sierra Club v. Morton*, 405 U.S. 727, 735 n.8 (1972). *Third*, the district court did not reject these alternative standing claims on the grounds now advanced by petitioners. Instead, the trial judge—acting in advance of this Court's ruling in *Bellwood*—held that respondents (who claimed that the racial stering practiced by Havens denied them the valuable benefits of interracial associations) "assert no more than the general public interest." Remanding the matter would therefore give the trial court an occasion to reconsider that ruling in light of *Bellwood*,[8] as well as to afford the opportunity for amendment of the complaint which the Court of Appeals contemplated. These developments could very well result in removing the need for further constitutional adjudication by this Court.

[8] *See* note 3 *supra*.

CONCLUSION

For the foregoing reasons, *amici* suggest respectfully that the writ of *certiorari* previously granted herein be dismissed as improvidently granted; that the judgment below be vacated and the case remanded to the district court to consider possible mootness, reconsider its rulings in light of *Bellwood*, and permit amendment of the complaint; or that the case be remanded for further development of the issues, to include such reconsideration and allowance of amendment.

Respectfully submitted,

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APPENDIX

APPENDIX

The Standing of "Testers" to Challenge Racial Steering Under the Fair Housing Act of 1968

The statute identifies expansively the discriminatory practices which it is intended to outlaw. 42 U.S.C. § 3604(a) makes it unlawful

> To refuse to sell or rent after the making of a bona fide offer, *or to refuse to negotiate* for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion or national origin.

(Emphasis supplied.) The italicized terms are very broad indeed. The "refusal to negotiate" language is independent of the limiting words, "after the making of a bona fide offer," [a] which appear in the first phrase. The statute confers on individuals the right to participate in negotiations for the sale or rental of property free from racial discrimination whether or not they have a *bona fide* intention to follow through with actual lease or purchase. The practice of racial steering constitutes a self-imposed limitation (on the ground of race or color) of a realtor's willingness to negotiate.[b]

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[a] At least one court has suggested that it is these words which have prompted decisions holding that "testers" have no standing. *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 898 n.4 (3d Cir. 1977).

[b] Racial steering practices uniformly have been held to be within the coverage of the Act, though generally on the theory that they are included within § 3604(a)'s catchall phrase, "otherwise make unavailable or deny." *E.g., United States v. Real Estate One, Inc.*, 433 F. Supp. 1140 (E.D. Mich. 1977); *Fair Housing Council v. Eastern Bergen County MLS*, 422 F. Supp. 1071 (D.N.J. 1976); *Zuch v. Hussey*, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975), *aff'd and remanded*, 547 F.2d 1168 (6th Cir. 1977) (*per curiam*). *Cf. Moore v. Townsend*, 525 F.2d 482 (7th Cir. 1975).

The three phrases of § 3604(a) are in the disjunctive; each applies "*to any person*" but only the first is restricted by the language, "after the making of a bona fide offer." Thus, construing § 3604(a) broadly to effectuate the Congressional purpose "to provide, within constitutional limitations, for fair housing throughout the United States," 42 U.S.C. § 3601; *see Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), the ban on racial steering extends to "testers" and other individuals who may not, at any given moment, be planning to make *bona fide* offers for the purchase or lease of particular property.

This reading of the statutory language is confirmed by the legislative history. Title VIII of the 1968 Civil Rights Act did not appear in the original House of Representatives version. It was added by an amendment on the Senate floor introduced by Senator Dirksen. 114 Cong. Rec. 4570 (February 28, 1968). However, § 204(a) in Senator Dirksen's amendment omitted the language in question and would have made it a discriminatory practice

> To refuse to sell or rent, to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

114 Cong. Rec. 4571 (February 28, 1968). The words "after the making of a bona fide offer or" were added subsequently, as the result of an amendment suggested by Senator Allott and accepted by the bill's Floor Manager, Senator Mondale. 114 Cong. Rec. 5515-16 (March 6, 1968).

When his amendment was brought up for discussion (cloture having been invoked on the bill), Senator Allott was very specific about its reach and effect. He stated that it

> . . . applies to sale or rental—the first four words only of line 7.
>
> It will be noted that the latter part of paragraph (a) is not conditioned upon a bona fide offer, because the amendment as offered concludes with the word "or" rather than "and."

114 Cong. Rec. 5515 (Mar. 6, 1968). On this basis, the amendment was accepted by Senator Mondale and incorporated into the bill. *Id.* at 5516-17.[c]

In addition, 42 U.S.C. § 3604(b) prohibits discrimination because of race or color

> against any person *in the terms, conditions* of sale or rental of a dwelling, or *in the provision of services or facilities in connection therewith* . . .

(emphasis supplied). Just as requiring more onerous application procedures for blacks can be viewed as discrimination in the terms or conditions of sale or rental, *cf. United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973), *modified as to relief and aff'd*, 509 F.2d 623 (9th Cir. 1975) (holding such conduct to be within "otherwise make unavailable or deny" language of § 3604(a)), so may racial steering practices be interpreted to be within the prohibitions of this subsection, which bars these prohibited practices from being applied to "any person." *Wheatley Heights Neighborhood Coalition v. Jenna Resales Co.*, 429 F. Supp. 486, 488 (E.D.N.Y. 1977).

Finally, § 3604(d) makes it illegal

> To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

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[c] There was no discussion of this language in the House, which passed the Senate version of the bill without change.

Racial steering constitutes an implicit, and sometimes a verbal, representation about the availability of housing. Hence it can be considered within the reach of this subsection. *Compare United States v. Hunter*, 459 F.2d 205, 215 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972) (implicitly discriminatory advertising; § 3604(c)); *United States v. Real Estate One, Inc., supra* n.b. (racial steering effect of assignment of black and white employees by realty firm).

Thus, we submit, the Fair Housing Act creates substantive rights of nondiscriminatory access to information and related housing market services in favor of *any person*, not just persons who make "bona fide offers" to purchase or lease property. These rights are precisely analogous to the "right to occupy certain public accommodations or conveyances" which petitioners concede was the basis for recognition of "tester" standing in *Pierson v. Ray*, 386 U.S. 547 (1967) and *Evers v. Dwyer*, 358 U.S. 202 (1958). *See* Brief for Petitioners at 23-24.[d]

Lower federal courts, while differing as to the applicable statutory subsection, have followed this general analysis, with the result of construing the Act to protect "testers," as well as "bona fide purchasers," from racial steering. *Grant v. Smith*, 574 F.2d 252, 255 (5th Cir. 1978) (*per curiam*); *Wheatley Heights Neighborhood Coalition v. Jenna Resales Co., supra. See also Northside Realty Associates, Inc. v. United States*, 605 F.2d 1348, 1355 (5th Cir. 1979); *Meyers v. Pennypack Woods Home Ownership Ass'n, supra* n.5, 559 F.2d at 898; *Smith v. YMCA of Montgomery*, 462 F.2d 634, 645-46 (5th Cir. 1972).

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[d] Thus, the fact that an individual's motivation for visiting a realty office was to conduct a "test" is irrelevant to his or her standing to redress deprivations of rights guaranteed by the Fair Housing Act. *See Evers v. Dwyer, supra*, 358 U.S. at 204.

Both Coleman and Willis sought to obtain accurate information about apartment availability by visiting the Havens Realty offices. Both were subjected to the demeaning experience of having Havens' employees' responses to their inquiries vary according to their racial identities. Each was, therefore, denied rights guaranteed by the Fair Housing Act of 1968 and had standing to sue for redress.